BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN BALLARD Claimant	)	
V.	)	
XEC CONSTRUCTION, INC. Respondent	)	Docket No. 1,065,021
AND	)	
TRAVELERS INDEMNITY CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 21, 2016, motion hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. David W. Whipple of Independence, Missouri, and Luis Mata of Kansas City, Missouri, appeared for claimant. Christina R. Madrigal of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ dismissed this claim with prejudice for lack of prosecution, finding the claim had not proceeded to settlement hearing, regular hearing, or agreed award within three years of the filing of the application for hearing on April 16, 2013. The ALJ also found claimant did not file a motion for extension of time within three years of the filing of the application for hearing.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 21, 2016, Motion Hearing and the transcript of the May 7, 2013, deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the ALJ erred in dismissing the claim based solely upon the fact a motion for extension of time was not filed within three years of the application for hearing. Claimant contends his claim was being actively pursued, and there was no showing of a lack of prosecution or good cause to allow the claim to proceed to hearing. Claimant argues his request for a prehearing settlement conference, held on March 23, 2016, should

be construed as the equivalent of a motion for extension of time pursuant to K.S.A. 44-523(f)(1) because claimant was actively prosecuting his case. Further, claimant argues principles of equitable estoppel should apply in this claim. Claimant wrote:

> With a Prehearing Settlement Conference being held so close to the expiration of the three year time period, and with counsel for Respondent not objecting to Claimant's request that this matter be set for a regular hearing, or objecting to the ALJ's indication that the case was cleared for regular hearing, and then filing such a motion after the three years had expired, it clearly appears that Respondent misled Claimant into believing that a motion for extension of time was not necessary.[1]

Additionally, claimant contends K.S.A. 44-523(f)(1) is unconstitutional as presently interpreted.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues claimant admitted to not filing a motion for extension of time within three years of the application for hearing as required by K.S.A. 44-523(f)(1). Further, respondent contends there is no statutory provision for anything other than a motion for extension of time as a mechanism to extend time. Respondent notes it is under no statutory obligation to notify claimant when the statute will run, and respondent argues there is no evidence showing it misled claimant into believing a motion for extension of time was unnecessary. Finally, respondent states the argument K.S.A. 44-523(f)(1) is unconstitutional is without merit, noting the statute was recently found to be constitutional by the Kansas Court of Appeals.[2]

The issues for the Board's review are:

1. Does K.S.A. 44-523(f)(1) automatically require dismissal of a claim for which no extension of time was filed within three years from the file date of the application for hearing?

2. Should claimant's request for a prehearing settlement conference on March 23, 2016, be construed as claimant's motion for extension of time?

3. Do the principles of equitable estoppel apply in this claim?

4. Is K.S.A. 44-523(f)(1) unconstitutional?

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[1] Claimant's Brief (filed Oct. 10, 2016) at 6.

[2] See *Breedlove v. Richardson Hauling, Inc., et. al.*, No. 114,600, 2016 WL 5844575 (Kansas Court of Appeals unpublished opinion filed September 30, 2016).

FINDINGS OF FACT

Claimant sustained an injury to his left shoulder on January 8, 2013, when he tripped on a curb and fell while working for respondent. Claimant filed an Application for Hearing with the Division related to this injury on April 16, 2013.

The following day, April 17, 2013, claimant underwent a left shoulder arthroscopy with Dr. Harlan. Claimant continued treatment until his release on August 23, 2013. Dr. Egea evaluated claimant at his counsel's request on September 18, 2013. Dr. Egea's report is not in evidence.[3]

A prehearing settlement conference was held on July 9, 2014. However, due to legal issues resulting in the loss of Dr. Egea's license, Dr. Egea became unavailable for deposition. Claimant's counsel then had claimant evaluated by Dr. Hopkins on July 6, 2015. Dr. Hopkins' report is not in evidence.[4]

Another prehearing settlement conference was held March 23, 2016, during which the claim was cleared for regular hearing. On April 18, 2016, three years had passed since claimant filed his Application for Hearing. Claimant admitted no motion for extension of time had been filed.

On April 27, 2016, respondent set its medical expert's deposition for August 8, 2016. Respondent then filed an Application for Dismissal with the Division on July 28, 2016. In a letter to respondent dated August 5, 2016, claimant indicated he presented dates for regular hearing and his expert's deposition the previous day. Respondent declined to schedule dates for either regular hearing or the expert deposition.

A motion hearing was held before the ALJ on September 21, 2016, at which time the ALJ granted respondent's motion. Claimant timely appealed.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-523(f)(1) states:

> In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with

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[3] The ALJ's notes indicate Dr. Egea provided a rating in his report. (See PHSC [July 9, 2014] at 2.)

[4] The ALJ's notes indicate Dr. Hopkins provided a rating in his report. (See PHSC [July 9, 2014] at 2.)

> notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

ANALYSIS

1. Does K.S.A. 44-523(f)(1) automatically require dismissal of a claim for which no extension of time was filed within three years from the file date of the application for hearing?

In *Glaze v. JK Williams LLC*, the Board wrote:

> In *Hackler, Hoffman and Ramstad*, the Board stated a claimant's motion to extend the three year period upon a showing of good cause must be made before the three year period expires. Because such motions were either not timely filed or not filed at all, the Board affirmed dismissals of those claims. In *Riedmiller*, the Board reversed a dismissal under K.S.A. 2011 Supp. 44-523(f) where the claimant: (1) requested an extension of time before the three year period expired and (2) she was prosecuting her claim.[5]

More recently, in *Garmany v. Casey's General Stores*, the Board wrote:

> Under the literal reading of K.S.A. 2011 Supp. 44-523(f), a motion to extend must be filed within the three year period after an Application for Hearing is filed and claimant must prove good cause to warrant an extension. No application was filed in this matter in the three year period after the filing of the Application for Hearing. The decision by the ALJ to dismiss this matter with prejudice is affirmed.[6]

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[5] *Glaze v. JK Williams LLC,* No. 1,063,419, 2016 WL 2619518 (Kan. WCAB Apr. 11, 2016), citing *Hackler v. Peninsula Gaming Partners, LLC*, No. 1,060,759, 2016 WL 858312 (Kan. WCAB Feb. 25, 2016), *pet. for rev. filed Mar. 22, 2016*; *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015); *Ramstad v. U.S.D. 229,* No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015); *Riedmiller v. Del Monte Foods Co.*, No. 1,061,483, 2015 WL 9672643 (Kan. WCAB Dec. 14, 2015).

[6] *Garmany v. Casey's General Stores*, No. 1,064,778, 2016 WL 4607978 (Kan. WCAB Aug. 17, 2016).

While dismissal is not automatic, if a claimant fails to meet the time limits of K.S.A. 2012 Supp. 44-523(f)(1) and respondent files a motion to dismiss, the claim, by statute, must be dismissed with prejudice for lack of prosecution.[7]

2. Should claimant's request for a prehearing settlement conference on March 23, 2016, be construed as claimant's motion for extension of time?

K.S.A. 44-523(f) allows dismissal upon respondent's motion if the claimant has not proceeded to a regular hearing, settlement hearing, or agreed award within three years from the date the Application for Hearing is filed. A prehearing settlement conference is not a regular hearing, a settlement hearing, or an agreed award.

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly worded workers compensation statutes.[8] The text of a statute should not be supplanted by information outside the plain wording of a statute.[9] In *Hoesli v. Triplett, Inc.,* the Kansas Supreme Court wrote:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. See *State v. Phillips*, 299 Kan. 479, 495, 325 P.3d 1095 (2014) (first task in construing statute is to ascertain legislative intent through analysis of language employed, giving ordinary words their ordinary meanings). A court does not read into the statute words not readily found there. *Whaley*, 301 Kan. at 196, 343 P.3d 63; *Graham*, 284 Kan. at 554, 161 P.3d 695; see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007). When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley*, 301 Kan. at 196, 343 P.3d 63.[10]

The events required by K.S.A. 44-523(f) to avoid dismissal of a claim are clearly stated in the statute. A prehearing settlement conference does not satisfy the requirements of the statute.

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[7] See *Hoffman* at 6.

[8] See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371, *rev. denied* 297Kan.1246 (2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[9] See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

[10] *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 361 P.3d 504, 508-09 (2015).

3. Do the principles of equitable estoppel apply in this claim?

Claimant argues the doctrine of equitable estoppel should prevent respondent from seeking dismissal of this matter because a prehearing settlement conference was held on March 23, 2016, approximately one month prior to the expiration of the three-year statute of limitations. Claimant argues respondent's statement that it was ready to try the case and did not object to setting the regular hearing in some way misled claimant.

For equitable estoppel to apply, a party must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts exist. The party must also show it rightfully relied and acted upon those beliefs and would now be prejudiced if the other party were permitted to deny the existence of those facts.[11]

Respondent did not have a duty to remind claimant of the upcoming statute of limitations. Claimant made no showing his reliance on respondent's silence caused him to not file a motion for an extension of time. No respondent has a statutory duty to raise this issue prior to the three-year period.[12] The doctrine of equitable estoppel has no application in this matter.

4. Is K.S.A. 44-523(f)(1) unconstitutional?

The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional.[13] A statute is presumed constitutional, and all doubts must be resolved in favor of its validity.[14] The Board does not have jurisdiction to rule on claimant's constitutionality issues.

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[11] See *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 561 P.2d 792 (1977).

[12] See *Breedlove v. Richardson Hauling, Inc. et al.*, No. 1,046,084, 2015 WL 5918866, (Kan. WCAB Sept. 21, 2015).

[13] See *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2016 WL 5886183 (Kan. WCAB Sept. 19, 2016)*; Houston v. University of Kansas Hospital Authority*, No. 1,061,355, 2016 WL 3669848 (Kan. WCAB June 17, 2016); *Anderson v. Custom Cleaning Solutions*, No. 1,070,269, 2014 WL 5798476 (Kan. WCAB Oct. 27, 2014); *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *Pinegar v. Jack Cooper Transport*, No.1,059,928, 2014 WL 1758036 (Kan. WCAB Apr. 9, 2014).

[14] See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 276, 75 P.3d 226 (2003); citing *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, *cert. denied* 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989).

CONCLUSION

The ALJ rightfully dismissed this claim with prejudice for lack of prosecution. The doctrine of equitable estoppel has no application in this matter.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated September 21, 2016, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

For reasons delineated in *Garmany*[15] the undersigned Board Member dissents from the majority's finding that K.S.A. 2012 Supp. 44-523(f)(1) automatically requires the dismissal of a claim for which no extension of time was filed within three years of the date the application for hearing was filed.

The undersigned agrees with the majority that the Board does not have the authority to determine whether K.S.A. 2012 Supp. 44-523(f)(1) is unconstitutional. However, the

[15] *Garmany v. Casey's General Stores*, No. 1,064,778, 2016 WL 4607978 (Kan. WCAB Aug. 17, 2016).

undersigned feels compelled to comment on why he believes the aforementioned statute is unconstitutional.

K.S.A. 2012 Supp. 44-501b(b) sets forth the legislative intent of the Kansas Legislature concerning the Kansas Workers Compensation Act (Act) for employers to pay employees compensation for work-related personal injuries. K.S.A. 2012 Supp. 44-501b(d) makes it clear that when an employee may recover compensation under the Act, the employer and employees are not subject to liability elsewhere, *i.e.*, the Act is the employee's exclusive remedy for recovery. Clearly, the intent of the Kansas Legislature is to compensate Kansas workers who suffer work-related personal injuries.

The Kansas Constitution Bill of Rights, in §18, provides: "Justice without delay. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

The courts have a duty to construe a statute constitutional, if the same can be done within the apparent intent of the legislature in passing the statute.[16] K.S.A. 2012 Supp. 44-523(f)(1) thwarts the Kansas Legislature's stated intent to compensate workers who suffer a personal injury by accident arising out of and in the course of their employment.

In *Injured Workers of Kansas,*[17] the Kansas Supreme Court stated:

> The plaintiffs claim that their due process rights have been violated because their remedy in a workers compensation claim has been restricted due to a more stringent notice of claim statute. In analyzing a potential due process violation, the following test should be utilized:
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> " 'If a remedy protected by due process is abrogated or restricted by the legislature, "such change is constitutional if '[1] the change is reasonably necessary in the public interest to promote the general welfare of the people of the state,' *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974), and [2] the legislature provides an adequate substitute remedy" to replace the remedy which has been restricted.' *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Aves v. Shah*, 258 Kan. 506, 521, 906 P.2d 642 [1995])." *Lemuz v. Fieser,* 261 Kan. 936, 946–47, 933 P.2d 134 (1997).
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> Under Step 1 of this due process test, the first question to ask is whether the new notice of claim statute imposed on plaintiffs injured at work, which restricts the plaintiffs' right to a workers compensation remedy, is reasonably necessary in the public interest to promote the general welfare of the people of the state. Another

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[16] *State v. Durrant,* 244 Kan. 522, 534, 769 P.2d 1174, *cert. denied* 492 U.S. 923, 109 S.Ct. 3254, 106 L.Ed.2d 600 (1989).

[17] *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 854-856, 942 P.2d 591 (1997).

> way to state this test is whether the legislative means selected (the notice requirement) has a real and substantial relation to the objective sought. See *Bonin v. Vannaman*, 261 Kan. 199, 217, 929 P.2d 754 (1996) (citing *Liggett*, 223 Kan. at 614, 576 P.2d 221; *Manzanares v. Bell*, 214 Kan. 589, 599, 522 P.2d 1291 (1974); Ernest, 237 Kan. at 129, 697 P.2d 870).
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> . . .
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> In applying Step 2 of the due process test, it is important to realize that the workers compensation remedy is not a common-law remedy. Rather, it is an adequate substitute remedy itself (or quid pro quo) for the abrogation of a worker's right to sue an employer for an on-the-job injury caused by the employer's negligence.
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> In 1911, the legislature stripped employees of their common-law right to bring a civil action against employers for injuries caused by an employer's negligence. "The legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed or abolished." *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 350, 757 P.2d 251 (1988), overruled in part on other grounds *Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991). Thus, when the legislature abolished the employees' common-law right to sue employers for injuries, the legislature provided the employees with an adequate substitute remedy (or quid pro quo) for the right abolished—the Workers Compensation Act. The Act allowed employees to quickly receive a smaller, set amount of money for injuries received at work, whether they were caused by negligence or not, as long as the notice requirement was met. Now, the legislature has made the notice requirement more strict so that workers compensation benefits are more difficult to receive, making the quid pro quo for abrogation of the employee's right to sue an employer for negligence less than what it once was. Thus, the question under Step 2 of the due process test is not whether the legislature provided an adequate substitute remedy for taking away the lenient notice requirement in the Act. Instead, the question becomes whether it has, under the Act, with its stricter notice requirement, become so difficult to receive an award that the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, then the stricter notice requirement, making the quid pro quo inadequate, violates due process.

In analyzing the first step delineated in *Injured Workers of Kansas,* the requirement that a claimant must affirmatively file a motion to before three years from the filing of his or her application for hearing requesting the claim not be dismissed is not reasonably necessary to promote the general welfare of the state. The general welfare of Kansas is not served by denying injured workers compensation benefits the Kansas Legislature intended them to have.

The second step of the due process test outlined in *Injured Workers of Kansas* is whether the Act is no longer an adequate substitute remedy for abrogation of employees' right to sue employers for negligence. If so, the requirement set forth in K.S.A. 2012 Supp. 44-523(f)(1) makes the quid pro quo inadequate and violates due process. Here, there is

no evidence claimant was not actively pursuing his claim. A prehearing settlement conference was held shortly prior to the expiration of the three-year period.

The Act imposes many deadlines upon injured workers, most of which have a logical basis. K.S.A. 44-520 requires injured workers to give their employer notice of the injury within 10 days after it occurs. The purpose of this stringent notice requirement is to give the employer an opportunity to investigate the accident and furnish prompt medical treatment.[18] There is also a logical purpose for K.S.A. 44-534(b), which states no proceeding for compensation shall be maintained unless an application for a hearing is filed within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

In the past two years, the Board has dismissed several claims because a claimant failed to file the motion required by K.S.A. 2012 Supp. 44-523(f)(1). Many of those claims, including the current one, were actively being prosecuted. In essence, the aforementioned provision requires a claimant to file his or her claim a second time, and for no discernable reason. Dismissing Mr. Ballard's claim also amounts to granting respondent a default judgment. An axiom of the law is that default judgments are not favored and is only granted when the inaction of a party frustrates the orderly administration of justice.[19] Yet, K.S.A. 2012 Supp. 44-523(f)(1) promotes default judgments.

A statute permitting a respondent to file a motion asking the judge to dismiss a claim for lack of prosecution and granting the authority to grant said motion has a legal and logical purpose: dismissing claims that have not been actively prosecuted. Such a statute gives an injured worker an opportunity to present his or her reasons for not actively prosecuting the claim. As written, K.S.A. 2012 Supp. 44-523(f)(1), a judge must dismiss claimant's claim, solely because he failed to file a motion to extend the three-year deadline. The judge is not allowed to consider claimant's medical condition or whether claimant has been actively prosecuting his case.

The Code of Civil Procedure as codified in the Kansas statutes imposes no requirement similar to K.S.A. 2012 Supp. 44-523(f)(1). A plaintiff in a lawsuit filed pursuant to Chapter 60 or 61 of the Kansas Statutes Annotated is not required to file a motion to keep his or her case open, or have it automatically dismissed after three years upon the defendant's motion. That further bolsters the argument that K.S.A. 2012 Supp. 44-523(f)(1) makes the quid pro quo of the Act inadequate.

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[18] See *Pike v. Gas Service Co.,* 223 Kan. 408, 573 P.2d 1055 (1978) and Bahr v. Iowa Beef Processors, Inc., 8 Kan App. 2d 627, 663 P.2d 627, (1983), *rev. denied* July 18, 1983.

[19] See *Reliance Insurance Companies v. Thompson–Hayward Chemical Co.*, 214 Kan. 110, 116, 519 P.2d 730 (1974) and *State of Kansas, ex rel., The Secretary of Social and Rehabilitation Services v. Paico,* No. 102,424, 236 P.3d 573, 2010 WL 3245297 (Kansas Court of Appeals unpublished opinion filed Aug. 13, 2010).

There are similarities between the present case and a *Westphal,*[20] a case decided by the Florida Supreme Court. The Florida Legislature amended its workers compensation act to limit temporary total disability benefits (TTD) to two years, or 104 weeks, even if the injured worker had not reached maximum medical improvement (MMI). Westphal, an injured worker, had numerous surgeries and despite not reaching MMI, had his TTD cut off because he reached the 104-week maximum. The Florida Supreme Court noted Westphal was not yet eligible for permanent total disability benefits and although he was incapable of working, fell in a gap in which he received no benefits. The Florida Supreme Court noted, "But, there must eventually come a 'tipping point,' where the diminution of benefits becomes so significant as to constitute a denial of benefits—thus creating a constitutional violation." The Court found the statute unconstitutional, stating:

> We conclude that the 104–week limitation on temporary total disability benefits, as applied to a worker like Westphal, who falls into the statutory gap at the conclusion of those benefits, does not provide a "reasonable alternative" to tort litigation. Under the current statute, workers such as Westphal are denied their constitutional right of access to the courts.

In essence, the Act is a trade. The Kansas Legislature traded injured workers' ability to file suit for their physical injuries, pain and suffering, permanent scarring, etc., for workers compensation. As part of the trade, workers who suffer a permanent impairment result for an injury arising out of and in the course of their employment are compensated, even when the employer was not at fault. In *Westphal,* there was no logical reason for the Florida Legislature to cut off a claimant's TTD after 104 weeks. Here there is no logical reason to automatically terminate a workers compensation claim after three years, should claimant fail to file a motion to extend the claim, nor does K.S.A. 2012 Supp. 44-523(f)(1) promote the general welfare of the people of the state.

This Board Member would also find that K.S.A. 2012 Supp. 44-523(f)(1) is unconstitutional because it violates the equal protection clause of the Kansas Constitution. In *Farley*,[21] the Kansas Supreme Court stated there are three standards of review for determining if a statute violates the equal protection clause. Even if the least stringent standard of review is applied, K.S.A. 2012 Supp. 44-523(f)(1) is likely unconstitutional.

In *Ernest*,[22] the Kansas Supreme Court struck down a statute stating that in order to maintain civil action, a person damaged from pesticide application must file with the county attorney, within 60 days after the date damage was discovered, a written statement

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[20] *Westphal v. City of St. Petersburg*, 194 So.3d 311, 2016 WL 3191086 (2016).

[21] *Farley v. Engleken,* 241 Kan. 663, 740 P.2d 1058 (1987).

[22] *Ernest v. Faler,* 237 Kan. 125, 697 P.2d 870 (1985).

that he or she was damaged. The court ruled the statute denied a remedy by due process of the law and also denied equal protection of the law. The court stated:

> The statute now before us, in our judgment, creates an unreasonable barrier and impediment to a civil remedy which simply is not fair and reasonable under the circumstances . . . But the requirement of serving a notice on the county attorney would seem to us to be a vain and useless act and clearly a trap for the unwary.

There is no legitimate purpose for requiring an injured worker to file a motion within three years after his accident or injury asking to keep his or her claim from being dismissed. One worker whose attorney files such a timely motion eventually gets compensated. Another worker with the same circumstances, files no such timely motion, and is denied workers compensation benefits.

For the foregoing reasons, *if* the undersigned Board Member had the authority and jurisdiction to do so, he would declare K.S.A. 2012 Supp. 44-523(f)(1) unconstitutional.

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BOARD MEMBER

CONCURRING OPINION

Given the language of the applicable version of K.S.A. 44-523(f), this Board Member concurs with the majority opinion that claimant's claim must be dismissed, but it is necessary for the undersigned to comment in a separate opinion on the unfortunate result in this claim.

There is no indication in the record that respondent contests that claimant sustained a right shoulder injury that arose out of and in the course of his employment. The injury was serious enough to require surgical treatment. However, as a result of the cited statutory provision, claimant can no longer receive authorized medical treatment, regardless of whether such treatment is reasonable and necessary to cure and relieve the effects of his injury. Although claimant may have sustained permanent impairment of function, he cannot be awarded permanent partial disability benefits.

When considering a statute, the most fundamental rule is that the intent of the legislature governs when that intent can be ascertained.[23] Common words must be given their ordinary meanings.[24]

In construing a prior version of K.S.A. 44-523(f), the Kansas Court of Appeals found the provision was enacted to create a way for the Division to dismiss claims that were abandoned by claimants, but never formally dismissed, and to allow the Division a way "to cleanse its house of stale claims."[25] The recent version of K.S.A. 44-523(f) that is applicable to this claim reduced the number of years for a claimant to proceed to regular hearing, preliminary hearing or settlement hearing from five years to three, but the legislative intent in enacting the current provision is the same.

This Board Member's concern is the application of K.S.A. 44-523(f) in this claim. The consequence is harsh, especially when there is no evidence claimant was untimely in prosecuting the claim.[26] This claim was not stale, nor was it abandoned. Any delay in prosecution evidently resulted from claimant's inability to depose the physician he retained for reasons beyond his control, and because of the necessity of having another physician examine claimant. The two medical evaluations resulted in opinions regarding claimant's permanent functional impairment. Such evaluations are generally obtained to prepare for the trial of the claim, via the regular hearing process, and to seek a final award. This claim was cleared by the ALJ for regular hearing, and claimant had already cleared a date for respondent's deposition.

Claimant has been denied his "day in court" and such a deprivation should be taken very seriously. All parties are entitled to a reasonable opportunity to be heard and present evidence.[27]

The manner in which K.S.A. 44-523(f) is applied in this claim is unfortunate and lacks fairness. This provision is being used as a trap for unwary claimants and the attorneys representing them. The undersigned must agree with the harsh result reached by the Board, due to the plain wording of the statute. However, such a result arguably does not reflect the intention of the legislature in enacting the provision.

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[23] See *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 317 P.3d 770 (2014).

[24] See *Cady v. Schroll,* 298 Kan. 731, 317 P.3d 90 (2014).

[25] *Welty v. U.S.D. No. 259*, 48 Kan. App. 2d 797, 799-800, 302 P.3d 1010 (2012).

[26] The version of K.S.A. 44-523(f) applicable in this claim refers twice to "lack of prosecution."

[27] K.S.A. 44-532(a).

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BOARD MEMBER

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Hon. Kenneth J. Hursh, Administrative Law Judge